COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-941

COMMONWEALTH

vs.

RICHARD C. SIMISON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A District Court jury convicted the defendant of operating a motor vehicle while under the influence of intoxicating liquor (OUI), and negligent operation of a motor vehicle. In a separate, subsequent jury-waived trial, the judge found him guilty as a fourth-time OUI offender.

On appeal, the defendant contends that the judge improperly instructed the jury on the element of operation. As to the subsequent offender trial, the defendant challenges the sufficiency of the evidence of his three prior OUI convictions, and argues that the judge denied his defense counsel the opportunity to present a closing argument. We affirm.

Background. The jury could have found the following facts. On July 26, 2016, after being observed driving erratically by another driver, Pembroke police detained the defendant at

Bryantville Liquors in Pembroke, where he had stopped to buy "nip" bottles of alcohol.[1] The defendant then performed poorly on field sobriety tests administered by the police officer who had responded to the dispatch reporting an erratic driver.

Immediately following the jury verdict on August 31, 2017, a bifurcated, jury-waived trial took place on that portion of the criminal complaint charging the defendant with being a subsequent OUI offender. The judge heard testimony from the booking officer that the defendant, whom he identified in court,[2] provided at the time of booking a specific home address, including the street name and house number, as well as his birth date. The judge received in evidence a Registry of Motor Vehicles (RMV) printout that showed the defendant's name and picture associated with that same biographical information. The judge also received a certified copy of a docket sheet showing the defendant's 1997 OUI third offense conviction in Plymouth District Court. The judge further received a certified copy of a docket sheet from Wareham District Court showing the defendant's 1992 OUI conviction for an offense that occurred in Pembroke. After hearing argument from defense counsel as to why

[1] The store clerk denied the defendant service because he was staggering and slurring his words.

[2] At oral argument, the defendant abandoned his claim that the judge abused his discretion by allowing an in-court identification of the defendant.

he should neither admit nor rely upon the certified docket sheets to establish prior convictions, the judge found this to be the defendant's fourth OUI offense.

Discussion. 1. Jury instruction. A person "operates" a motor vehicle within the meaning of G. L. c. 90, § 24 (1) (a) (1), "by starting its engine or by making use of the power provided by its engine." Commonwealth v. Ginnetti, 400 Mass. 181, 184 (1987). Here, the judge instructed the jury that "there's a lot of law in Massachusetts that talks about when people actually start to operate a motor vehicle . . . [b]ut suffice it to say for us in this case, if you find -- and it's always beyond a reasonable doubt -- that the [d]efendant was driving that day, that satisfies the [element of] operation" (emphasis added). Because there was no objection at trial to this instruction, we review to determine if there was error in the instruction and, if so, whether the error created a substantial risk of a miscarriage of justice. See Commonwealth v. Freeman, 352 Mass. 556, 564 (1967). The defendant claims that this instruction misstated the law and created a substantial risk of a miscarriage of justice, because it allowed the jury to convict him if they concluded that he drove his car at any point during "that day" -- July 26, 2016.

We see no error, much less one that created such a risk. The defense at trial was not that the defendant was not

operating a motor vehicle on July 26, 2016; it was that he was not intoxicated. The defendant testified that he was swerving and ran off of the shoulder of the road on Mattakeesett Street because he dropped his phone under the gas pedal, that he did not consume three of the six small bottles of one hundred proof vodka that were recovered from his passenger seat floor until after he parked his vehicle at the liquor store, and that he was staggering because of an old leg injury. The only question for the jury was whether they believed him. The judge was not required to use any particular words when instructing the jury, and, under the facts of this case, we conclude that the judge's instruction on operation "convey[ed] the relevant legal concepts properly." Commonwealth v. Kelly, 470 Mass. 682, 697 (2015). We are confident that a reasonable juror would have understood that, in order to convict the defendant, they would have to find that he operated a motor vehicle while under the influence of intoxicating liquor and not merely at some point during the day.

2. Sufficiency. Next, the defendant claims that there was insufficient evidence to establish that this conviction constituted his fourth OUI offense. We review this claim to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

"The sufficiency of docket sheets as evidence of prior convictions is well settled in the Commonwealth." Commonwealth v. Jewett, 471 Mass. 624, 636 (2015). See G. L. c. 90, § 24 (4) ("certified attested copy of original court papers . . . shall be prima facie evidence that a defendant has been convicted previously"). Here, the Commonwealth introduced a certified copy of a docket sheet showing that a "Richard C. Simison" of a specific address in Pembroke previously was convicted of OUI, third offense. That "Richard C. Simison" has the same birth date as the defendant. The docket sheet, together with the booking information provided by the defendant, and the information contained in his RMV records, was sufficient to satisfy the Commonwealth's burden. See Jewett, supra at 636-637. See also Commonwealth v. Bowden, 447 Mass. 593, 599 (2006); Commonwealth v. Ellis, 79 Mass. App. Ct. 330, 336 (2011). There was no error.

3. Closing argument. Finally, the defendant claims that he is entitled to a new trial on the subsequent offender charge because the judge denied his attorney the opportunity to make a closing argument during the subsequent offender portion of the bifurcated trial on the subsequent offense charge. However, the record shows that defense counsel advanced both legal and

factual arguments over the admissibility and relevance of the Commonwealth's evidence that the judge considered before arriving at his finding. When the judge announced his finding without closing arguments having been made or requested, counsel neither asked to be heard further, nor objected. The right to make a closing argument derives from the right to counsel under the Sixth Amendment to the United States Constitution, see Commonwealth v. Marvin, 417 Mass. 291, 292 (1994), but the defendant does not claim that his attorney was ineffective. Nor does he articulate what, if any, additional arguments his counsel would or might have advanced if the judge had invited closing arguments. In short, the defendant has not satisfied his burden of showing that the judge denied his counsel the right to present a closing argument. See Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 12-13 (1986).

Judgments affirmed.

By the Court (Blake, Henry & McDonough, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: November 4, 2019.

[3] The panelists are listed in order of seniority.